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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 926

BETHLEHEM STEEL COMPANY, ET AL., *Petitioners,*

v.

UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Customs and Patent Appeals

PETITION FOR REHEARING

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PETITION FOR REHEARING

Bethlehem Steel Company and Maryland Shipbuilding & Drydock Company pray that this Court grant rehearing of its order of February 13, 1967, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the United States Court of Customs and Patent Appeals in the above-entitled case as prayed for in the petition filed December 30, 1966, herein.

Reasons for Granting Rehearing and Issuing the Writ

1. Three days before this Court entered its order on February 13 denying certiorari, the United States Court of Appeals for the Fourth Circuit decided a case with which the decision below comes into direct con-

flict. *United States* v. *Moran Towing & Transportation Company, Inc., et al.,* Nos. 9867, 9868, decided Feb. 10, 1967. A copy of the Fourth Circuit's opinions in the *Moran* case is appended hereto.

The question presented in the petition for writ of certiorari (Pet. 2), with which respondent does not quarrel (see Pet. Reply Br. 1), is whether the court below was correct in holding that petitioners' mid-bodies were not vessels.

In the *Moran* case the United States, consistently with its position and with the decision below in the instant case, had argued that a floating drydock was not a "vessel" or "other craft" within the meaning of the Wreck Act, Act of Mar. 3, 1899, c. 425 §§ 15, 16, 19, and 20, 33 U.S.C. 409, 411, 412, 414, and 415. The Court of Appeals for the Fourth Circuit unanimously decided this question adversely to the United States.[1]

In reaching its decision, the Court of Appeals adverted to the statutory definition of a vessel found in 1 U.S.C. 3 (*infra,* App. 12), reviewed a number of cases in which various "strange craft" had been held to be vessels (*infra,* App. 12), and went on to say (*infra,* App. 12-13):

> "* * * the definition [of vessel] is held to extend to relatively permanent or stationary structures which are in no sense, when serving their primary function, engaged in transportation. *Their capability,* though more theoretical than practical, *brings them within the definition.*

[1] Judge Sobeloff, although dissenting, specifically agreed with the court's majority that the drydock was a vessel, saying:

> "The definition of a 'vessel' is, as the majority points out, sufficiently broad to encompass the dock." (*Infra,* App. 26-27)

> "This floating dry dock was as *capable of use* as a means of transportation on water as other specialized craft which have been held to be vessels. During much of the voyage we have described, it had a crewman aboard. It carried portable pumps and navigation lights. It was not designed to carry cargo, but it had been regularly employed in lifting and supporting ocean going vessels, and there is no reason to suppose that, if occasion arose, it could not have been used, under tow, for the movement of objects from one place to another." (Emphasis supplied)

By these tests, petitioners' midbodies were vessels *a fortiori.* Pet. 4-5. Even more than the drydock's, the midbodies' capability of use as a means of water transportation brought them within the statutory definition of vessel (1 U.S.C. 3), in addition to which the midbodies were actually used as such means of transportation. The Fourth Circuit carefully considered (*infra,* App. 13-15) the contrary decision of the Court of Customs and Patent Appeals in the instant case and found it not persuasive, saying that petitioners' midbodies would clearly have been vessels within the meaning of the Wreck Act. It follows that the midbodies were vessels for the purpose of determining whether they were subject to duty, for it is the same definition that governs what is a vessel under the Wreck Act and what is a vessel under the customs laws.

Although the Fourth Circuit sought to reconcile its *Moran* decision with that of the court below in the instant case, on the ground that the Court of Customs and Patent Appeals "was concerned with the protection of American industry, shipyards and employees" (*infra,* App. 15), a ground which, as we pointed out in our petition for writ of certiorari (Pet. 12-13), is

appropriate for congressional rather than judicial consideration, there can be no question, reading as a whole the pertinent portions of the Fourth Circuit's opinion (*infra,* App. 11-15), that the decision of the Court of Customs and Patent Appeals, of which review is here sought, directly conflicts with this latest word from the Fourth Circuit as to what is a vessel.

2. This question continues to be of vital importance to the shipping industry (Pet. 13-14; Pet. Reply Br. 4-5). Indeed, this latest Fourth Circuit decision also illustrates how live and important are the questions of what constitutes a vessel and of the meaning of the statutory definition, 1 U.S.C. 3. These call for resolution by this Court.

CONCLUSION

For the reasons set forth above, in the petition for writ of certiorari, and in petitioners' reply brief, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the United States Court of Customs and Patent Appeals.

Respectfully submitted,

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Certificate of Counsel

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and I do further certify that said petition is restricted to grounds which are confined to intervening circumstances of substantial effect.

March 10, 1967.

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